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United States

October Term, 1975

CASE NO. 75-47

ELAINE M. ORR,
Petitioner,

vs.

FRANK R. MacNEILL & SON, INC.,
Respondent.

BRIEF OF PETITIONER IN REPLY TO RESPONDENT'S BRIEF

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STATEMENT

The Petitioner, ELAINE M. ORR, hereby replies to the Brief of Respondent in Opposition to The Petition For Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit as follows:

In the Respondent's Brief, the Respondent makes the bald assertion that there is no evidence whatsoever of sex discrimination other than Mrs. Orr's testimony that Frank R. MacNeill had said: "Mr. Malcolm MacNeill would not pay a woman as much as a man . . . ." (Tr. 29) There is substantial evidence on this point in the record which the trial judge considered. In addition to Mrs. Orr's statement that sex discrimination was clearly involved, there was testimony of other sex discrimination practices in the company admitted by Malcolm MacNeill. Malcolm MacNeill, in his testimony, when asked if there were any other woman manager or vice president employed at Frank R. MacNeill & Son, Inc., answered in the affirmative and related that Mr. Moore was replaced by a woman subsequent to Mrs. Orr's leaving. The replacement, Linda Snyder, has the same duties as Mr. Moore and the same responsibility as Mr. Moore in the casualty department. On cross-examination Malcolm MacNeill related the following:

"Q. Is this lady making the same money Mr. Moore was when he left?
A. Yes, sir, approximately.

Q. How much is that?
A. I think Mr. Moore, if I recall the figures, was making $14,000 and she is making almost as much.

Q. On a temporary basis?
A. Yes, sir. I say almost as much. She is probably making $10,000, $10,100, $10,200." (Tr. 131)

Obviously either Malcolm MacNeill believes that a four thousand dollar discrepancy in salary is almost the same, or, he believes that it is a justifiable salary for a woman replacing a man in the same position.

In the converse situation, the male employee hired to replace Mrs. Elaine M. Orr in the accounting department with no prior experience in that position or company, or for that matter, in insurance related accounting, was immediately compensated at the same salary as Mrs. Orr had received after twenty years of service to the corporation. (Tr. 55) It is these disparities in compensation that alerted the trial judge to the obvious sex-related compensation rate that encouraged the district court judge to write:

> "Following Plaintiff's resignation, Defendant hired a replacement, Mr. Gaskins, who was hired at almost the same salary Plaintiff had been receiving, although he had considerably less experience. Defendant claims this evidence supports its position, but on the contrary it underlines the discrimination exercised against Plaintiff." (App. 16)

The appellate court discredited this finding of the District Court, but the basis of its position was a hypothetical proposition that if the successor's work was performed as well as Petitioner, he should receive equal pay. The appellate court has no jurisdiction to pose such hypothesis. Examination of the compilation of salaries of the Petitioner and the other vice presidents (App. 14) reveals that the discrepencies in salary commenced in 1968 which was the period during which Malcolm MacNeill assumed the responsibility for determining the amount of

compensation each vice president was to receive. Malcolm MacNeill stated that it was his decision alone to determine the compensation for his vice presidents and that the method arrived at in determining the specific compensation was never discussed or explained to the Petitioner. (Tr. 121)

As to the Respondent's contention that Frank R. MacNeill denied having made the statement that his son would not pay a woman as much as a man, it must be pointed out that Frank R. MacNeil did not deny having made that statement or admit that statement. (See R. 100). Respondent's reference to page 100 of the record (on page 2 of its brief) to the effect that Frank MacNeill denied making a statement about Malcolm MacNeill's position concerning payment of wages to women is absolutely incorrect. Reference to page 100 of the record reveals only equivocation on the part of MacNeill. His testimony on pages 103-104 of the record, moreover, is quite clear to the effect that Petitioner did make such complaint to him. It is clear that Frank R. MacNeill was approached by Mrs. Orr and she did submit to him written documents regarding her employment and the compensation she received stating that she was unhappy with that compensation. (Tr. 103-104)

The Respondent takes the position that the Petitioner did not perform "equal work" of substantially equal importance to the Respondent. That contention is not substantiated by the record. Petitioner testified as to the equal importance of the work of all four vice presidents of the corporation. (Tr. 28) Thomas B. Rogan, one of the four

vice presidents of the corporation, responded to testimony before the trial judge in the following fashion:

"Q. Are you familiar with the overall operation of a general agency?
A. Yes, I am.

Q. But you still can't answer this question from the standpoint that the operation of an accounting department and a claims department are equal insofar as the overall operation of the agency is concerned?
A. Well —

Q. One function is just as important as the other, is it not, Mr. Rogan?
A. Yes." (Tr. 81-82)

The testimony of Jack Bruns, another of the vice presidents, was as follows:

"Q. Mr. Bruns, would you say that the importance of the accounting department was equal to that of the fire department?
A. The importance?

Q. Yes, insofar as the general agency was concerned.
A. Yes, sir." (Tr. 88-89)

To further substantiate the alleged discrepancies in judgment necessary to perform the jobs, Bruns testified:

"There were certain procedures that were used in order to properly make up accounts for the agents and for company records based on business that was submitted by our agency, and I was unfamiliar with that particular facet of the business when I was recalled into the inside, or to be a manager of the fire department and Mrs. Orr was thoroughly familiar with all of the aspects of my department; therefore, I consulted in her and received advice as to the best way to properly handle it as far as an office manager, so as to speak, before." (Tr. 91-92)

He further testified:

"Q. Do you know whether or not Mrs. Orr performed any functions outside of the accounting department for the agency?
A. Over the years, yes, sir. She wasn't always in the accounting department. She had various duties.

Q. What were they?
A. Well, I can't really tell you except that she had worked in the various departments throughout the years that she had been there and had performed various duties and functions over the years. Whenever the need arose, she would attempt to do the job for the MacNeills." (Tr. 87-88)

ARGUMENT

Respondent on page 11 of its brief argues that the difference in wages paid to Petitioner and the other managers was based upon economic benefits.

Even the testimony of Malcolm MacNeill points to the "equal work" and equal responsibility of the Petitioner. It is undisputed that Petitioner assumed the management of the accounting department during 1963. (Tr. 38, 126) Malcolm MacNeill testified since that department was under the leadership of Mrs. Orr, the corporation has been continuously profitable. (Tr. 126) The trial judge also heard the unrefuted evidence of Elaine Orr, supported by the testimony of Bruns that it was Mrs. Orr who recovered some $80,000 from companies that had been overpaid due to a mix up in the bookkeeping system prior to her involvement and, that the management of Frank R. MacNeill & Sons, Inc. was unaware of that money being due them at the time. Bruns testified thusly "I really — I would have to say that she found money based on her efficiency that her predecessors were unable to locate or had caused to be unavailable, let's put it that way." (Tr. 90) Furthermore, as to making money for the insurance agency, it was also testified that Petitioner reduced the overhead $26,000 after she took charge in 1963 and from that year forward, the company has been consistently profitable. (Tr. 38, 126) From 1963-1971 she was able to perform all accounting duties without adding any additional personnel to that department while the insurance agency experienced continuous overall growth in terms of volume.

Respondent, on page 10 of its brief, describes the managerial positions in this case as "uniquely different".

It is interesting to note that the United States Court of Appeals in this case proclaimed that to be unique "a thing must be the only one of its kind, without an equal or an equivalent". The court indicated that every case is different from every other case. The court implied, therefore, that every case is "unique". If Respondent intended to use the term "unique" as the Fifth Circuit used that term, Petitioner will agree that the managerial positions are unique — just as all cases are unique. Such uniqueness of cases does not prevent the application of precedents.[1] A fortiori such uniqueness of positions should not prevent the application of the governing statute in Title 7 cases.

[1]It should be pointed out that the Circuit Court noted this principle with approval in its opinion but did not favor us with a citation of the governing precedents. We submit that the reason for the Court's lack of such citation is the total absence of governing precedents in this case, as we have indicated elsewhere in this brief.

CONCLUSION

The Conclusion of the Respondent's brief tries to read the identical job standards of the Equal Pay Act (29 USC 206 (d)) into the Civil Rights Act of 1964, (Title 7, 42 USC §2,000(e) et seq). We admit that every violation of the Equal Pay Act would likewise be a violation of Title 7, but not every violation of Title 7 is a violation of Equal Pay.

The *Robert Hall* case cited by Respondent in its Conclusion was an Equal Pay case. The instant case is a Title 7 case. In her Petition, Petitioner cited the District Court's opinion in *Robert Hall* since the philosophy and the semble of that decision were in harmony with the Petitioner's position in this case, to wit: the mere fact that an employer receives greater economic benefits from one employee than he receives from another employee will not effectively mask discrimination based purely upon the sex differences of the employees. Citation of the Circuit Court of Appeal's decision in *Robert Hall* by the Respondent in its Conclusion is improper in that, as stated above, the *Robert Hall* case was an Equal Pay case and the Third Circuit's holding was to the effect that under the undisputed fact situation there existed no discrimination based upon sex was established. The basis of the unequal pay was only the difference in economic benefits received by the employer from the male and female employees.

There were no clear-cut precedents to guide the trial judge in the instant case. The earlier Title 7 cases involved non-managerial positions—clerical jobs where one was a "mirror image" of the other. The trial judge recognized this when he stated the following in his Conclusion of Law:

"This is not the typical production line case or retail clerks or bank tellers situation where the job requirements can be calibrated in minute detail." (App. 16, 17).

The trial judge correctly concluded that in this case of first impression there was nothing in the reported decisions or in the statute itself which made the statute inapplicable to managerial positions. Rarely is one managerial position a mirror-image of another. There is no requirement of absolute identity of positions as a prerequisite to application of Title 7. As pointed out in the Petition and in this brief, there was ample testimony upon which the trier of fact found that "blatant discrimination exists". (App. 18). The court saw through the employer's attempt to minimize the importance of the Petitioner's job for the sophistry it truly is when he, in his Findings of Fact and Conclusion of Law, wrote the following:

"Defendant's contention is that the production departments are the important part of their business and without the production you don't need accounting. Malcolm MacNeill testified that the accounting department is in no way as important as the other departments and insurance companies never pay personnel in accounting departments as much as personnel in production departments; and that this situation exists in general agencies as well.

Defendant's contention was disputed by the other two department heads, Mr. Bruns and Mr. Rogan, and the court finds an insurance agency

operation of this size depends with success upon the efficient functioning of all its departments." (App. 15).

"The court finds that the plaintiff has shown discrimination in salary based on sex.

1. Plaintiff has clearly shown the salary discrimination she suffered when her salary is compared with that of Mr. Bruns resulted from sexual discrimination." (App. 16).

The above findings by the court establishes a per se violation of 42 USC 2,000(e) et seq. The finding renders an appellate court powerless to reverse unless it retries the case de novo which, of course, it is powerless to do so.

As to the contentions of the Respondent that female tellers should make the same as male loan managers and other ludicrous arguments, it need only be pointed out that persons whose status within the corporation structure, as in the instant case, are of equal dignity and are of equal importance should be paid equal compensation. The Trial Judge in this case found that "an insurance agency operation of this size depends with success upon the efficient functioning of all its departments." (App. 15).

Petitioner respectfully requests that this court take jurisdiction of the case so as to settle the question of executive compensation pursuant to the Equal Employment Opportunites Act, Title 7, 42 USC 2,000(e) et seq. and give meaning to this legislative enactment to provide the

same safeguard against discrimination in compensation for the executive or manager as for the assembly line type worker.

Respectfully submitted this 22nd day of September, 1975.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Response in Opposition was mailed to FRATES FLOYD PEARSON STEWART PROENZA & RICHMAN, P.A., Attorneys for Respondent, Twelfth Floor Concord Building, Miami, Florida 33130, this 22nd day of September, 1975.

Richard H. W. Maloy
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